93-148

No.

In The

Supreme Court of the United States

October Term, 1993

CRAIG WINES OLIVER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is harvested material which has no roots or root structure, which is dead, and which is not capable of reproducing, a "plant", thus triggering statutory and sentencing guideline penalties which are based upon the number of plants involved in the criminal activity rather than upon the quantity of consumable drugs?

II. Should federal courts require prosecutors to strictly comply with the terms of plea agreements or should prosecutorial breaches of plea agreements be excused by plain error, harmless error, or other types of procedural analyses?

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OPINIONS BELOW

On March 10, 1993, the United States Court of Appeals for the Sixth Circuit affirmed petitioner's conviction and sentence for manufacturing marijuana in violation of 21 U.S.C. § 841. (3a). On April 21, 1993, the Court of Appeals denied Petitioner's Motion for Reconsideration and Suggestions for Rehearing *in banc*. (1a).

STATEMENT OF JURISDICTION

Petitioner, Craig Wines Oliver, now moves this Honorable Court for a writ of certiorari and review of the Judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled cause on March 10, 1993. (3a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND UNITED STATES SENTENCING GUIDELINES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property without due process of law. . . .

Title 21 U.S.C. § 841(a)(1) provides in relevant part:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> > (1) to manufacture . . . a controlled substance.

Title 21 U.S.C. § 841(b)(1)(A)(vii) provides in relevant part:

> (a)(A) In the case of a violation of subsection

(a) of this section involving—

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight. . .

such person shall be sentenced to a term of imprisonment which may not be less than 10 years. . .

Title 21 U.S.C. § 841(b)(1)(B)(vii) provides in relevant part:

(b)(A) In the case of a violation of subsection (a) of this section involving—

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight. . .

such person shall be sentenced to a term of imprisonment which may not be less than 5 years. . .

U.S.S.G. 2D1.1(c) provides in relevant part as follows:

In the case of an offense involving marihuana plants, if the offense involved (A) 50 or more marihuana plants, treat each plant as equivalent to 1 KG of marihuana; (B) fewer than 50 marihuana plants, treat each plant as the equivalent of 100 G of marihuana. **Provided,** however, if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

U.S.S.G. 5A provides in relevant part:

Offense Level 24	51-63 months
Offense Level 32	121-151 months

STATEMENT OF THE CASE

On September 18, 1990, officers obtained a search warrant and searched a garage rented by the petitioner in Grand Traverse County, Michigan. The officers discovered harvested marijuana hanging from the ceiling. The harvested material was dead, and no longer had any attached root systems. The officers counted the harvested material and concluded that the material was equivalent to 509 unharvested plants.

Subsequently, a two count federal indictment was returned. Petitioner was charged with one count of manufacturing marijuana between April of 1989 and September of 1990 and one count of marijuana possession on September 18, 1990, in violation of 21 U.S.C. § 841, 21 U.S.C. § 802, and 18 U.S.C. § 2.

On February 12, 1992, the petitioner signed a plea agreement, whereby he agreed to plead to the marijuana manufacturing count; the possession count was to be dismissed after sentencing. As part of the plea agreement, and pursuant to U.S.S.G. 6B1.4, the parties entered into agreements relating to marijuana quantity, acceptance of responsibility, and role in the offense.

Specifically, the parties agreed that the following was readily provable:

A. The harvested marijuana seized during the search represented between 100 and 509 plants.

B. The total relevant conduct for sentencing purposes did not

exceed 700 plants. Each party was free to argue for a quantity within the agreed range of 100-700 plants.

C. The petitioner had accepted responsibility and the government would recommend credit be given, pursuant to U.S.S.G. 3E1.1 as long as the petitioner refrained from further criminal activity and cooperated with the probation officer during the presentence stage of the proceedings.

D. The petitioner was not an organizer or leader of a criminal activity involving 5 or more people. Each party was free to argue about whether some other role modification was appropriate.

The plea hearing was held on February 13, 1992. The court stated that it was not bound by the parties' agreements and that the court would make its own decisions regarding those matters. During the Rule 11 colloquy, the petitioner admitted to having grown approximately 100 plants.

On March 20 and March 30, 1992, hearings were held to determine the quantity of marijuana for which the petitioner should be held responsible at sentencing. Officers who were involved in the search testified about the marijuana which they had seized and the method by which they had determined the number of plants which they had included in their reports. One of petitioner's former associates testified that he had participated in the 1989 harvest. It was his recollection that 800-1200 plants were harvested and that 30 pounds of usable marijuana resulted. On cross examination, this individual conceded that he had testified to a lower quantity during grand jury proceedings, that he had never counted the plants, and that he was guessing at the quantity.

Another of petitioner's former associates testified that he had assisted in removing the buds from the stalks in 1989. This individual estimated the output from the 1989 crop as ten pounds.

Petitioner's expert witness was a Doctor of Horticulture and

Professor Emeritus from Michigan State University. The expert testified by affidavit that he had viewed a video tape of the search and that he believed that the figures were overstated because some of the harvested material which was treated as plants by the authorities were in fact no more than branches.

During the hearing, the prosecutor stated his belief that the testimony of his witnesses was accurate, even though the quantities indicated by the witnesses exceeded the number of plants to which the prosecutor had agreed upon in the plea agreement. At the close of the hearing, and without mentioning the plea agreement, the prosecutor indicated that the quantities were at least between 400 and 700 plants. However, the prosecutor also stated that the actual amount was up to the court. The import of the prosecutor's statement was that the government would not oppose a finding of more than 700 plants for sentencing purposes.

The district judge concluded that there was conflicting testimony about quantity both as to the 1989 and the 1990 harvests. The district judge then determined that he would use 400 plants to measure 1990 conduct because some of the material which the authorities identified as plants could have been branches. The court further determined that "approximately the same quantity of 400-700 in quantity should be calculated for the year 1989."

The presentence officer calculated the sentencing guidelines as follows:

Base offense level, based upon 1000-3000 kilograms,U.S.S.G. 2D1.1(c)(6)	32
Role adjustment: 5 or more people supervised U.S.S.G. 3B1.1(a)	4
Credit for acceptance denied	0
Total Offense Level	36

The presentence officer concluded that the guidelines should be 210-262 months, based upon a total offense level of 36 and a criminal history score of II. U.S.S.G. 5A. All three of the components used by the presentence officer in his calculation were contrary to the agreed upon understandings in the plea agreement.

On May 18, 1992, the petitioner filed a sentencing memorandum challenging these three issues. The petitioner argued that the number of plants should be below 500, that the role aggravator was unjustified, that the petitioner should have been given an acceptance credit, and that the criminal history score should have been I.

On May 29, 1992, the prosecutor filed his sentence memorandum. Even though the plea agreement had contained contrary terms, the prosecutor vigorously argued in support of an 800-1400 plant finding and further argued that the relevant conduct inquiry should be expanded to include additional, prior years. The prosecutor further argued that the 1000-3000 kilogram determination made by the presentence officer should be used to determine the petitioner's sentence. Alternatively, the prosecutor argued that petitioner's sentence should be based upon no less that 700-999 plants.

Despite the plea agreement, the prosecutor also argued that the four level role enhancement was proper and that acceptance should be denied. At no time during these arguments did the prosecutor acknowledge the agreements which had been incorporated in the plea agreement.

Petitioner was sentenced on June 5, 1992. The prosecutor reaffirmed the position which he had taken in his sentencing memorandum. The court determined that the proper sentencing quantity was between 700 and 1000 kilograms. A two level role adjustment was made, and acceptance was denied. The criminal history objection was granted. These calculations produced

guidelines of 121-151 months based upon an adjusted offense level of 32 and a criminal history score of I. The court then imposed a 150 month custodial sentence.

A timely appeal was taken to the United States Court of Appeals for the Sixth Circuit. Among other things, petitioner argued that the prosecutor had breached the plea agreement by making vigorous and persistent arguments which were contrary to the provisions of the plea agreement. The petitioner also argued that the court should consider this issue even though no objection was made in the District Court. The petitioner also challenged the sentence computation, arguing among other things that harvested materials should be measured by the amount of consumable output. In support, the petitioner argued that harvested materials were no longer plants because the materials were dead and because the materials no longer had any rootballs or other evidence of a root system.

On March 10, 1993, the Sixth Circuit rejected petitioner's claims in an unpublished opinion. (3a). The court ruled that the petitioner had waived his complaint about the prosecutor's alleged breach of the plea agreement because it was not raised in the district court. (6a). The court further concluded that the prosecutor's quantity arguments at the March, 1992 hearings did not breach the plea agreement. (6a). However, the court did not address petitioner's other arguments. (5a-6a). A concurring opinion by one of the judges indicated a belief that the government had come very close to breaching the plea agreement. (9a).

As to quantity, the court ruled that the district judge had carefully weighed the evidence and that there was no clear error. (7a). The court did not address the petitioner's other arguments about whether the district judge correctly applied the law to the factual determinations made. (6a-7a).

A timely Petition for Reconsideration and Suggestions for

Rehearing *in banc* was filed. This petition was denied on April 21, 1993. (1a).

REASONS FOR GRANTING THE WRIT

There are two reasons for granting the writ. The first reason is rooted in questions of statutory construction and congressional intent. The Circuits are severely split as to whether Congress intended marijuana growers to be punished as a class or whether Congress intended a risk-based approach which punished marijuana growers more severely after initial growth but before harvest, when the societal risk represented by the growers was at its peak. This split has led to a vastly different punishment system for marijuana growers depending on the grower's geographical location.

The second reason is based upon constitutional considerations and upon widely different interpretations of *Santobello v. New York*, 404 U.S. 257 (1971). The Circuits are deeply divided as to whether prosecutorial breaches of the plea agreement should be viewed strictly or upon a harmless error type of analysis, whether appellate review should be based upon the *de novo* or clear error standards, and whether a defendant waives his *Santobello* claim if he does not raise it initially in the district court. The division is based upon two competing views of a prosecutor's obligation. One view is that a defendant gives up fundamental rights when a guilty plea is entered and that justice requires strict enforcement of the prosecutor's concomitant obligations. The second view acknowledges that rights are waived but takes the position that the prosecutor's mistakes can be overlooked if the errors are harmless or if the defendant makes a procedural error.

Both questions involve fundamental questions and splits among the Circuits. As a result, certiorari is appropriate.

I.

IS HARVESTED MATERIAL, WHICH HAS NO ROOTS OR ROOT STRUCTURE, WHICH IS DEAD, AND WHICH IS NOT CAPABLE OF REPRODUCING, A "PLANT", THUS TRIGGERING STATUTORY AND SENTENCING GUIDELINES PENALTIES WHICH ARE BASED UPON THE NUMBER OF PLANTS INVOLVED IN THE CRIMINAL ACTIVITY RATHER THAN UPON THE QUANTITY OF CONSUMABLE DRUGS?

21 U.S.C. § 841 (b)(l)(B)(vii) establishes a mandatory minimum five year sentence if an offense involves

> 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight.

21 U.S.C. § 841(b)(1)(A)(vii) uses similar language in establishing a ten year mandatory minimum sentence if 1000 kilograms or 1000 plants regardless of weight are involved in the offense behavior.

The Sentencing Guidelines establish the base offense level for marijuana in terms of weight. U.S.S.G. 2D1.1 (c). However, if plants are involved, a paragraph following U.S.S.G. 2D1.1(c) applies; that paragraph reads as follows:

> In the case of an offense involving marihuana plants, if the offense involved (A) 50 or more marihuana plants, treat each plant as equivalent to 1 KG of marihuana; (B) fewer than 50 marijuana plants, treat each plant as the equivalent to 100 G of marihuana. **Provided,** however, if the actual weight of the marihuana

> is greater, use the actual weight of the marihuana.

The guidelines do not define the word "plant". The guidelines also do not define the scope of the phrase "an offense involving marihuana plants" and do not specify any bright line rules which establish when "plants" are to be used as the basis for sentencing. The guidelines do not specifically justify the 50 plant cut-off or the rationale for increasing the conversion rate ten times when a fiftieth plant is involved in the offense.

The "plant" versus "output" controversy is complicated and the Circuits are divided on a number of matters. The initial question focuses on what materials are considered "plants" as that term is used in the statute and the sentencing guidelines. This question is important because a number of the cases have drawn the dividing line based upon whether or not the court concludes the materials involved are "plants". The problem is additionally complex because neither Congress nor the sentencing guidelines have specifically defined the word "plant." Neither source defines what makes a case a "plant" case rather than some other type of case.

There seems to be no difficulty when the offender is caught when the plants are living, growing, and mature. The guidelines and the courts seem to be in general agreement that, in this circumstance, the number of plants rather than consumable output should be used to determine the defendant's sentence. *See, e.g.*, U.S.S.G. 2D1.1; *United States v. Blume*, 967 F.2d 45 (2d Cir. 1992); *United States v. Holmes*, 961 F.2d 599 (6th Cir.), *cert. denied*, 113 S. Ct. 232 (1992).

Problems and conflicts have developed when the alleged materials are either in the early part of the growing cycle or have been harvested and are no longer growing.

A. The Immature Organism

One body of cases deals with the situation where the organism is in the early growth stage. Defendants in those cases have attempted to reduce their sentencing exposure by arguing that the material is too immature to be considered a plant. The general result of those cases has been to conclude that a "plant" is a living organism with a root ball or some other kind of recognizable root system. Accordingly, if the material has a root system, it is treated as a plant and counted for purposes of determining sentencing exposure. On the other hand, if the material doesn't have a root system, it is not viewed as a plant and is excluded from the sentencing calculation. Thus, immature materials are essentially ignored for sentencing purposes. *See, e.g., United States v. Curtis,* 965 F.2d 610 (8th Cir. 1992) (a cutting that develops a root hair is a plant); *United States v. Fitol,* 733 F. Supp. 1312 (D.Minn. 1990) (cuttings with root systems are plants); *United States v. Eves,* 932 F.2d 856 (10th Cir. 1991) (plain meaning of the word should be adopted, and if there are roots, there is a plant); *United States v. Malbrough,* 922 F.2d 458 (8th Cir. 1990) (cutting not a plant until it develops roots); *United States v. Corley,* 909 F.2d 359 (9th Cir. 1990) (only cuttings with sufficient roots to survive are plants); *United States v. Carlisle,* 907 F.2d 94 (9th Cir. 1990) (same); *United States v. Bechtol,* 939 F.2d 603 (8th Cir. 1991) (a cutting which has developed root hairs is a plant); *United States v. Edge,* 989 F.2d 871 (6th Cir. 1993) (a cutting without a rootball is not a plant; there must be readily observable evidence of root formation); *United States v. Angell,* 794 F. Supp. 874 (D. Minn. 1992) (marijuana seedlings that have no visible root structure are not plants); *United States v. Lee,* 957 F.2d 778 (10th Cir.), *cert. denied,* 113 S. Ct. 475 (1992) (cuttings with roots are plants).

B. Harvested Material: Current Year

The courts have been less clear when it comes to harvested material which is dead and which no longer has any root system. On the one hand, the material is not a "plant" using the definition

developed for the immature organism; the organism is dead and there is no root system. On the other hand, the harvested material has resulted in the actual production of some quantity of marijuana. Accordingly, and unlike the immature organisms, the harvested materials will not be completely excluded from the sentencing equation. The issue thus becomes whether the sentencing impact of the harvested materials should be measured in terms of "plants" or the "weight of the output."

The cases are few, and the Courts are divided. For example, *United States v. Graham*, 710 F. Supp. 1290 (N.D. Cal. 1989), one of the first cases to consider the issue, held that the guidelines and statute apply to live plants. On appeal, the Ninth Circuit affirmed and specifically made a distinction between live plants and harvested materials. The Court's clear implication was that it believed that harvested materials were not to be treated as plants in the penalty equation. *United States v. Corley*, 909 F.2d 359 (9th Cir. 1990). This distinction was further confirmed in *United States v. DeLeon*, 955 F.2d 1346 (9th Cir. 1992), which stated that live plants are punished by number of plants and dry leaf marijuana is punished by weight. In *United States v. Osburn*, 955 F.2d 1500 (11th Cir.), *cert. denied*, 113 S. Ct. 223, 240 (1992), the court was reviewing a district court decision which had invalidated the entire plant calculation system. The court upheld the system and reversed the district court. In reaching this decision, however, the court dealt with the argument that individuals caught during the growing cycle were dealt with more harshly than individuals who were caught after the plants were harvested. The Eleventh Circuit agreed that this was an apparent anomaly, thus holding that harvested materials are not plants for guideline purposes. The court then ruled that the anomaly did not affect the constitutionality of the statute. *See also, United States v. Bradley*, 905 F.2d 359 (11th Cir. 1990) which indicated that "plant" measurement system should be used when live plants are discovered prior to harvest, thus implying that harvest is the cutoff point and that "weight" or "output" should be used thereafter.

In *United States v. Blume*, 967 F.2d 45 (2d Cir. 1992), the Second Circuit reversed a sentence which had been computed by treating harvested materials as plants when determining the defendant's punishment. The court held that harvested material was no longer in plant form and that, as a result, the plant measurement provision of the guideline and statute no longer applied. Rather, the "output" or "weight" method was appropriate.

The decisions of the Second, Ninth, and Eleventh Circuits are consistent with the immature organic material decisions discussed in the previous section in that the courts use the "plant" sentencing mechanism only when the material has roots.

The Sixth Circuit analysis used in the instant case is obviously in conflict with *Graham, Corley, DeLeon, Osburn, Blume,* and the immature organism cases. In the instant case, it was clear that the material had been harvested. The material was no longer in plant form because it was dead and it no longer had roots. The Sixth Circuit, however, ignored the definition of plant and the cases from its sister circuits by basing its decision upon the allegedly, careful factual examination of the district judge rather than upon the legal question of whether the facts as found by the judge triggered the "plant" or "output" measurement system.

The Seventh Circuit has created a further Circuit conflict. In *United States v. Haynes*, 969 F.2d 569 (7th Cir. 1992) and *United States v. Curry*, 977 F.2d 1042 (7th Cir. 1992), the court decided to treat harvested materials as if they were plants by approving sentences calculated on the basis of the number of plants. The decision had the effect of adding enormous periods of time onto the defendant's sentences. For example, in *Haynes*, the plant approach resulted in a sentence based upon 12,500 plants/kilograms as opposed to a sentence based upon 400 kilograms. The Seventh Circuit did not acknowledge the Second Circuit's decision in *Blume*, with which it was in direct conflict, nor did it base its analysis upon the definition of plant. The court also did not

consider *DeLeon, Corley, or Osburn, supra,* which reached a different statutory conclusion. Rather, it looked to the "provided" clause at the end of the guideline paragraph in U.S.S.G. 2D1.1 which states that the actual weight of marijuana should be used if the actual weight produces a more severe result than the number of plants. The court reasoned that the converse must also be true and came to the conclusion that harvesting did not make a difference to the statutory construction.

C. Harvested Material: Prior Years

In petitioner's case, the court punished petitioner based not only upon the current year's harvested materials, but upon an estimate of the prior year's harvested materials. The prior year's estimate was also based upon "plants" as opposed to the "weight" or "output" of the material harvested.

On appeal, the petitioner argued that this computation method was directly in conflict with *United States v. Blume*, 967 F.2d 45 (2d Cir. 1992). In *Blume*, the defendants were caught in the act of growing approximately 5,500 plants. When computing the sentence, the district court determined that the defendants had grown and equivalent amount of plants in the prior year. The sentence was thus based upon approximately 11,000 plants. The Circuit Court reversed. The court reasoned that the harvested materials from the prior year were not within the plant sentencing methods provided by the statute and the guidelines because they were dead and no longer had any root system. Re-sentencing was ordered using the consumable output as the basis for the prior year; the use of plants in the current year was approved because they were alive and growing when they were seized.

The Seventh Circuit reached a contrary conclusion in *United States v. Haynes*, 969 F.2d 569 (7th Cir. 1992) which held that harvested materials from prior years should be treated as plants for punishment purposes.

The Sixth Circuit avoided the issue in the instant case. Other Circuits have not recognized the conflict or the problem and have just assumed that the "plant" measurement system applies to harvested materials. *See, e.g., United States v. Knapp*, 955 F.2d 566 (8th Cir.), *cert. denied*, 113 S. Ct. 175, 679 (1992), where the plant punishment system was used for prior year's crops, but where the court did not address the issue of whether plants or output should be used to measure the punishment for material harvested in prior years.

D. Intent of Congress and the Sentencing Commission

A second and distinct analytical problem focuses on the Circuits' interpretation of what Congress and the Sentencing Commission had in mind when they adopted the bifurcated measurement system. This division has added to the controversy because the differing Circuits have justified their positions with significantly different interpretations of the intent underlying the "plant" versus "output" sentencing choices.

The Circuits are in general agreement that, at least in certain circumstances, Congress and the Sentencing Commission intended to punish growers more harshly than distributors. The issue has generally arisen in the context of grower prosecutions where the plants were growing at the time of seizure and where the growers challenged the artificial Guideline formula that one plant equals one kilogram of drugs. Among other things, the growers argued that the ratio was unrelated to reality and, that as a result, the artificial ratio was unconstitutional.[1] In rejecting these arguments, the Circuit Courts have concluded that Congress and the Sentencing Commission intended to more severely punish growers because they believed that growers represented a greater

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1. In the usual scenario, the grower argues that the actual output of the plant is far less one kilogram. As a result, the formula penalizes the grower more harshly than the grower would be penalized if out put were used.

threat to society than other members of the distribution chain. *See, e.g., United States v. Osburn*, 955 F.2d 1500 (11th Cir. 1992); *United States v. Bradley*, 905 F.2d 359 (11th Cir. 1990); *United States v. DeLeon*, 955 F.2d 1346 (9th Cir. 1992); *United States v. Motz*, 936 F.2d 1021 (9th Cir. 1991); *United States v. Holmes*, 961 F.2d 599 (6th Cir.), *cert. denied*, 113 S. Ct. 232 (1992); *United States v. Webb*, 945 F.2d 967 (7th Cir. 1991); *United States v. Underwood*, 970 F.2d 1336 (4th Cir. 1992); *United States v. Smith*, 961 F.2d 1389 (8th Cir. 1992); *United States v. Lee*, 957 F.2d 778 (10th Cir.), *cert. denied*, 113 S. Ct. 475 (1992); *United States v. Jordan*, 964 F.2d 944 (9th Cir.), *cert. denied*, 113 S. Ct. 478 (1992); *United States v. Proyect*, 989 F.2d 84 (2d Cir. 1993). *Cf., United States v. Carolene Products*, 304 U.S. 144 (1937) and *Chapman v. United States*, 111 S. Ct. 1919 (1991) (dealing with Congress's authority to adopt differential punishment systems).

The intent analysis, however, is not as clear cut when the cases involve immature or harvested plants. The immature organism cases, discussed *supra*, do not consider whether Congress intended to punish growers more harshly than other segments of the distribution chain. Rather, those cases uniformly focus upon the definitional question of whether the organism at hand is or is not a "plant".

This linchpin of this analysis is the unspoken premise that Congress and the Sentencing Commission did not intend to treat marijuana growers as a class and did not intend to punish the grower class more harshly in all circumstances. There is no question that an individual caught with organisms in the early stages of marijuana cultivation is a grower and that the individual would have continued with the cultivation cycle if the authorities had not intervened. If class punishment was intended, all of the immature organism cases are inconsistent with the "growing plant" cases. If the immature organism cases are correct, then the two groups of cases can only be reconciled by concluding that Congress and the Sentencing Commission intended to more

harshly punish growers only when the grower is apprehended in the process of growing live and mature plant material.[2]

This modified view of congressional intent would also be consistent with cases such as *United States v. Blume*, 967 F.2d 45 (2d Cir. 1992), *United States v. Corley*, 909 F.2d 359 (9th Cir. 1990), and *United States v. Osburn*, 955 F.2d 1500 (11th Cir.), *cert. denied*, 113 S. Ct. 233, 242 (1992) all of which concluded that harvested materials were not plants and that "plants" measurement system should not be used to establish the defendant's sentences.

The contrary approach was adopted by the Seventh Circuit in *United States v. Haynes*, 969 F.2d 569 (7th Cir. 1992) and *United States v. Curry*, 977 F.2d 1042 (7th Cir. 1992). The Seventh Circuit has apparently adopted a "class" approach to the analysis. In *Haynes*, the court concluded that Congress intended to punish marijuana growers more harshly regardless of when they were apprehended. Thus "plants" were used to compute the defendant's sentence for both growing and harvested plants.[3]

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2. The conclusion that Congress intended to harshly punish growers at this particular point in the cycle is bolstered by a series of "gender" cases. Male marijuana plants do not produce usable marijuana and are discarded by the growers as the plants mature. Defendants have argued that male plants should be excluded from the punishment calculation. The courts have generally rejected this argument, holding that Congress did not intend any such distinction. *See, e.g., United States v. Curtis*, 965 F.2d 610 (8th Cir. 1992), *United States v. Webb*, 945 F.2d 967 (7th Cir. 1991) and *United States v. Traynor*, 990 F.2d 1153 (9th Cir. 1993).

These cases are consistent with the interpretation that Congress's wrath was directed at growers who are apprehended while mature plants are alive and growing. Plant sex is irrelevant at the immature organism and harvested stage.

3. The sentence differential was enormous. The court's conclusion held the defendant responsible for 12,500 plants which translated into an equal number of kilograms. A first offender under these assumptions would be facing guidelines of 188-235 months. U.S.S.G. 5A.

(Cont'd)

The Sixth Circuit approach is ambivalent. In *United States v. Edge*, 989 F.2d 871 (6th Cir. 1993), the Circuit joined its sister circuits by holding that a cutting is not a plant until there was readily observable evidence of root formation. However, in petitioner's case, the court did not base its analysis upon roots or root formation and avoided the issue altogether.

Other Circuits are equally ambivalent in that they have not attempted to reconcile the approach to congressional and Sentencing Commission intent taken in the immature organism cases, the growing, mature plant cases, and the harvested material cases. Thus, these Circuits have embraced the concept that Congress intended to punish marijuana growers more harshly but also debate whether a cutting is a plant and whether such cuttings should be excluded from the sentencing equation. *See, e.g., United States v. Coones*, 982 F.2d 290 (8th Cir. 1992) (punish marijuana growers based upon their place in the chain of distribution, rather than upon the predictable yield of the plants); *United States v. Curtis*, 965 F.2d 610 (8th Cir. 1992) (a cutting that develops a root hair is a plant); and *United States v. Angell*, 794 F. Supp. 874 (D.Minn. 1992) (seedlings without a visible root structure are not plants).

The ineluctable conclusion that stems from this analysis is that the Circuits are confused and divided about congressional intent and are in sore need of direction from this Court so that the rules can be uniformly applied.

(Cont'd)

The output or weight associated with these plants was 400 kilograms. Had this measurement system been used, a first offender would face guidelines of 78-97 months.

This tremendous sentencing disparity is an important reason for this Court to accept petitioner's case.

E. Summary of the Conflicts

The conflicts can be summarized from the following perspectives:

1. *Immature Organism Cases*: The Sixth, Eighth, Ninth, and Tenth Circuits have held that immature organisms should be counted in the sentencing equation only if they are plants. The distinction is based upon whether the organism has or has not developed a root system.

2. *Harvested Material Cases:* The Second, Ninth, and Eleventh Circuits have concluded that harvested materials are no longer plants and that the "plant" measurement system is not triggered. The Seventh Circuit has reached an opposite conclusion and would use "plants" in all grower cases regardless of harvesting. The Sixth Circuit avoided the question in the instant case by basing its determination of the district court's factual analysis rather than upon the legal question.

3. *Congressional Intent:* The Second, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh circuits have upheld the use of the artificial one plant/one kilogram conversion formula in cases involving growers and live plants. The rationale common to these cases is that Congress and the Sentencing Commission intended to punish growers more harshly than other members of the distribution chain. None of the Circuits have directly addressed the scope of this intent and whether this same intent analysis applies to immature organisms and harvested materials.

The Sixth, Eighth, Ninth, and Tenth Circuits have implicitly held that Congress did not intend to punish growers more harshly when immature organisms are involved. The Second, Ninth, and Eleventh Circuits have reached the same implicit conclusion regarding harvested materials. The Seventh Circuit would punish

all growers more harshly regardless of when they were apprehended.

F. Application of this Problem to the Petitioner's Case and the Basis for Certiorari

Petitioner received a 150 month sentence because his case arose in the Sixth Circuit and because that Circuit refused to consider the "plant" argument as it applied to harvested materials. Had petitioner committed his offense in the Second, Ninth, or Eleventh Circuits, his sentence would have been more than halved on the same facts.[4] This type of geographical disparity applies to petitioner and all marijuana growers. This disparity cannot be justified. A person's federal sentence should not be a function of where the offense is committed. The Circuit split is significant and is based both upon definitional and intent issues. The split also implicates constitutionally based issues in that the inconsistent definitions and interpretations of congressional intent run afoul of the basic concept of lenity when ambiguities are encountered in federal statutes and in that if the inconsistent definition survives, vagueness problems of constitutional dimension are created. *See, e.g., Rewis v. United States*, 401 U.S. 808 (1971) (lenity) and *United States v. Batchelder*, 442 U.S. 114 (1979) (which held that sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute).

Petitioner believes that once a plant is harvested it is no longer a plant. Petitioner believes that the harsh, plant-based punishment system was only intended to apply to growers who are apprehended in the act of growing. Once a plant is harvested, the

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4. In the instant case, when plants were used, petitioner's guidelines were 121-151 months. U.S.S.G. 5A. Had output been used, petitioner's guidelines could have been as low as 51-63 months. U.S.S.G. 5A. In other words, petitioner's guidelines more than doubled when the "plant" methodology was used.

societal risk is fixed because the output can be mathematically determined. Before harvest, the societal risk is uncertain because the crop's output is unknown.

In any event, this extreme state of confusion over basic issues justifies this Court's attention so that uniform rules can be applied throughout the Circuits and so that the goals of the Sentencing Guidelines can be achieved.

II.

SHOULD FEDERAL COURTS REQUIRE PROSECUTORS TO STRICTLY COMPLY WITH THE TERMS OF PLEA AGREEMENTS OR SHOULD PROSECUTORIAL BREACHES OF PLEA AGREEMENTS BE EXCUSED BY PLAIN ERROR, HARMLESS ERROR, OR OTHER TYPES OF PROCEDURAL ANALYSES?

In *Santobello v. New York*, 404 U.S. 257 (1971), this Court developed the basic principles which have since governed the plea bargain process:

1. Plea bargaining is an "essential component of the administration of justice" and is to be encouraged. 404 U.S. at 260.

2. Plea agreements must be fairly secured, and the plea must be voluntary and knowing. 404 U.S. at 261.

3. If the "plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262.

4. The basis for relief includes the interests of justice and the prosecutorial duty that arises when promises are made in order to obtain guilty pleas. 404 U.S. at 262.

In *Mabry v. Johnson*, 467 U.S. 504 (1984), this Court expanded *Santobello's* scope by holding that due process rights are implicated when a defendant enters into a plea agreement and gives up rights such as self incrimination, confrontation and trial. Accordingly, once a plea agreement is accepted, the due process clause is implicated, and a breach of the plea agreement violates the Constitution.

Finally, in *United States v. Benchimol*, 471 U.S. 453 (1985), the Court held that a prosecutor need not enthusiastically endorse the provisions of a plea agreement. However, if the government has made a promise, it must adhere to it. A bargain is a bargain, and the government is obligated to live up to its promissory obligations.

In the almost 23 years since *Santobello* was decided, plea agreements have become an ever more important part of the federal judicial system. However, the Circuits are deeply divided as to whether the courts should vigilantly and vigorously protect defendants' rights against prosecutorial breaches or whether prosecutorial breaches should be excused if they are minor or if procedural mistakes occurred.

The critical issue raised by this petition is whether a defendant waives his *Santobello* rights if he does not formally raise them in the district court. There are two threshold issues, however, which illustrate the split in the Circuits and the extreme, differing views taken by the Circuits regarding the need to protect defendants' rights.

The first threshold issue focuses on whether a prosecutor should be strictly held to the promises made and whether a defendant should be granted relief in the event of a breach, even if the breach is relatively minor or unintentional. The strict view is held by the Third and Fifth Circuits. In those Circuits, the courts focus upon the *Mabry* approach and put great weight upon the

rights which a defendant gives up when a plea agreement is executed. These Circuits conclude that it would be unjust to force a defendant to surrender his basic constitutional privileges without imposing a strict burden on the prosecutor to live up to the government's reciprocal promises. *See, e.g., United States v. Goldfaden*, 959 F.2d 1324 (5th Cir. 1992) (breach found when government advocated a specific guideline range even though the plea agreement stated that the government would make no sentencing recommendation); *United States v. Valencia*, 985 F.2d 758 (5th Cir. 1993) (breach found when government characterized the evidence about acceptance even though the plea agreement stipulated that the acceptance credit should be awarded; *United States v. Hayes*, 946 F.2d 230 (3d Cir. 1991) (government strictly held to a promise that it would not recommend a specific sentence); *United States v. Badaracco*, 954 F.2d 928 (3d Cir. 1992) (breach found when prosecutor endorsed a presentence officer's recommendation to add points for more than minimal planning even though the plea agreement stipulated that such planning was not involved). *See, also, United States v. Canada*, 960 F.2d 263 (lst Cir. 1992) (which found a breach of the plea agreement when the prosecutor supported the imposition of a higher sentence than that stipulated in the plea agreement and also failed to apprise the court of the full extent of the appellant's cooperation).

The opposite side of the coin is illustrated by *United States v. D'Iguillont*, 979 F.2d 612 (7th Cir. 1992), *United States v. Yanez*, 985 F.2d 371 (7th Cir. 1993) and the petitioner's case.

In *D'Iguillont*, the government argued for an upward departure even though the government promised in the plea agreement that it would recommend a sentence within the guideline range. On appeal, the government conceded that it had breached the plea agreement. The Seventh Circuit granted no relief, finding that the breach was harmless error. In *Yanez*, a similar "harmless error" analysis was adopted when the issue was whether the government's breach of an oral promise to make no

sentencing recommendation, recommend acceptance, and to make known the extent of the defendant's cooperation, justified relief. In denying relief, the Seventh Circuit relied heavily upon the fact that the district judge was not influenced by the government's alleged breaches.

In the instant case, the government repeatedly breached the plea agreement in a number of areas and on a variety of different subjects. Had this case been in the Third or Fifth Circuits, relief would have been granted because of the strict construction given to the prosecutor's obligations. Because petitioner was in the Sixth Circuit, he was granted no relief.

The second and related threshold question focuses on the standard of review to be given to claimed breaches. One view is such questions should be reviewed *de novo*; the contrary view is that deference should be given to the district judge and that the issue should be reviewed for clear error. In the former case, the appellate court adopts a stricter approach; such an approach is based upon the notion that such scrutiny is required because of the substantial rights which a defendant gives up. *See, e.g., United States v. Jimenez*, 928 F.2d 356 (10th Cir.), *cert. denied*, 112 S. Ct. 164 (1991); *United States v. Moscahlaidis*, 868 F.2d 1357 (3d Cir. 1989); *United States v. Jeffries*, 908 F.2d 1520 (11th Cir. 1990). In the latter approach, the appellate court defers to the district judge's judgment and does not view the question as one where the defendant has to be scrupulously protected because of the rights that were surrendered when the plea agreement was signed. *See, e.g., United States v. Conner*, 930 F.2d 1073, *cert. denied*, 112 S. Ct. 420 (1991); *United States v. Ataya*, 864 F.2d 1324 (7th Cir. 1988); *United States v. Pollard*, 959 F.2d 1011 (D.C. Cir.), *cert. denied*, 113 S. Ct. 322 (1992); *United States v. Tilley*, 964 F.2d 66 (lst Cir. 1992).

The issue upon which petitioner focuses is an extension of these threshold issues. Petitioner believes that his plea agreement

was breached by the repeated actions of the prosecutor which ignored the conditions of the plea agreement. Although the prosecutor and the court were well aware of the fact that the prosecutor's positions did not dovetail with the plea agreement, the Sixth Circuit held that petitioner had waived the *Santobello* argument because he did not formally raise the issue in the district court.

The Circuits are deeply divided on the waiver issue. The basis of this division is the same philosophical difference that divides the Circuits on the two threshold questions: namely, should the courts make a special effort to protect defendants against prosecutorial breaches because they have surrendered basic constitutional rights when they entered into the plea agreement.

The Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have made the defendant's rights secondary to the adherence with procedural niceties.

Thus, in *United States v. Baker*, 781 F.2d 85 (6th Cir. 1986), the defendant claimed that the government had made an oral promise to stand mute at sentencing. However, the defendant did not mention this promise during the plea proceedings, and he did not object when the government made a sentencing recommendation. The court declined to address the issue, holding that the defendant's failure to object at sentencing waived the claim on appeal. In *United States v. D'Iguillont*, 979 F.2d 612 (7th Cir. 1992), the government argued for an upward departure, despite a promise not to make such an argument in the plea agreement. On appeal, the government conceded that this argument breached the plea agreement. Nevertheless, the Seventh Circuit found waiver and refused to consider relief since the defendant did not object below. Similar results were reached in *United States v. Pryor*, 957 F.2d 478 (7th Cir. 1992) and *United States v. Yanez*, 985 F.2d 371 (7th Cir. 1993).

The Eighth Circuit enforced the waiver doctrine in *United States v. Benson*, 836 F.2d 1133 (8th Cir. 1988). In *Benson*, the defendant objected to the government's failure to inform the sentencing court about the full range of his cooperation as promised by the plea agreement. The Eighth Circuit determined that the issue had been waived and that the defendant had not shown plain error.

The Ninth Circuit has also adopted the waiver approach. In *United States v. Flores-Payon*, 942 F.2d 556 (9th Cir. 1991), the Court held that disputes about plea agreements should be resolved at the district court level. The court felt it would be unfair to the prosecutor if the argument were raised for the first time at the appellate level. Moreover, the court was concerned that the district court did not have an opportunity to develop the record.

The Eleventh Circuit took a similar position in *United States v. Jeffries*, 908 F.2d 1520 (11th Cir. 1990). In that case, the U.S. Attorney who negotiated the plea agreement indicated that the government would stand mute at sentencing and would not present evidence of other drug deals. A different government attorney appeared at sentencing and introduced this evidence, resulting in a substantially greater sentence than the defendant anticipated. On appeal, the Eleventh Circuit considered some objections which the defendant had preserved. However, one alleged breach of the plea agreement had not been presented below, and the court determined that it had been waived. The court's rationale, which is common among those courts which have adopted this view, is that the purpose of the waiver doctrine was to give the district court an opportunity to consider the errors.

The opposing position is taken in the Second, Third, Fifth, and Tenth Circuits. The Second Circuit has rejected the waiver argument in three cases. In *Paradiso v. United States*, 689 F.2d 28 (2d Cir. 1982) and *United States v. Corsentino*, 685 F.2d 48 (2d Cir.

1982), the Second Circuit permitted the defendant to raise the issue via an appeal of a denied 2255 petition even though the defendant had not alleged any breach during the original sentencing proceedings. In *United States v. Brody*, 808 F.2d 944 (2d Cir. 1986), the defendant was allowed to raise the breach argument on appeal even though he had made the argument during a Rule 35 presentation rather than at sentencing.

The Third Circuit has taken a similar position. In *United States v. Moscahlaidis*, 868 F.2d 1357 (3d Cir. 1989), the defendant did not object to the prosecutor's breach in the district court and the government argued waiver when the objection was raised on appeal. The Third Circuit ruled that there was no need to object in the district court and that the issue can be raised on direct appeal.

The Fifth Circuit is in complete agreement. In *United States v. Goldfaden*, 959 F.2d 1324 (5th Cir. 1992), the government breached a promise to make no recommendation as to the sentence which the defendant should received. The defendant did not object at the district court level, but he did raise the issue on direct appeal. The Fifth Circuit took the position that a prosecutor's breach of the plea agreement was plain error and that the appellate court could consider the issue without forcing the appellant to make a higher showing. The court based its decision upon *Mabry* and the violation of a defendant's due process rights. The court was also concerned about the impact of a prosecutor's broken promise upon the fairness, integrity and public reputation of judicial proceedings.

This position was confirmed in *United States v. Valencia*, 985 F.2d 758 (5th Cir. 1993) where the government stipulated that the defendant should receive the acceptance of responsibility credit and then argued the contrary position at sentencing. The court held that the breach of the plea agreement was plain error and granted relief.

The Tenth Circuit has also ruled that a breach of the plea agreement can be raised for the first time on direct appeal and that there is no waiver if the defendant did not raise it earlier. *United States v. Hand*, 913 F.2d 854 (10th Cir. 1990) and *United States v. Shorteeth*, 887 F.2d 253 (10th Cir. 1989). *Cf.*, however, *United States v. Walling*, 982 F.2d 447 (10th Cir. 1992) which contains some contrary dicta.

The First Circuit has noted the debate, but has not taken a firm position. *United States v. Gonzalez-Perdomo*, 980 F.2d 13 (1st Cir. 1992). In a case decided at the same time as *Gonzalez*, however, the court did grant relief to a defendant who had not raised the issue in the district court and, indeed, raised the issue for the first time during appellate oral argument. The breach involved a government promise to recommend a sentence within the applicable guideline range; the government did not do so and admitted its breach during oral argument. The court deemed this an exceptional circumstance and granted relief to avoid a miscarriage of justice and to aid in the administration of justice. *United States v. Mercedes-Amparo*, 980 F.2d 17 (1st Cir. 1992). At least one other case, however, suggested a leaning toward the waiver position. *United States v. Atwood*, 963 F.2d 463 (1st Cir. 1992).

This court has not taken a direct position on the issue. It was not reached in *Santobello* because the defendant did object to the government's sentencing recommendation. Several of the appellate courts that have rejected the waiver doctrine have relied in part on Justice Stevens' dicta in *United States v. Benchimol*, 471 U.S. 453 (1985) where he stated that a breach of the plea agreement could be raised at sentencing or on appeal.

Petitioner believes that the deep split between the Circuits justifies this Court's review. One of the great concerns in the administration of justice is the fundamental injustice which occurs when a person's treatment depends on the geographical accident of

where his crime occurred. Had petitioner been tried in the Second, Third, Fifth, or Tenth Circuits, petitioner believes that the court would have found a breach of the plea agreement and that he would have been granted relief. This is the type of anomaly that the court should address and remedy.

Petitioner also believes that the Second, Third, Fifth, and Tenth Circuits are correct, and that appellate review of a prosecutor's breach of the plea agreement should not depend on whether the objection was raised before the district judge.

These Circuits are correct because of the fundamental rationales that underlay *Santobello* and *Mabry*. A defendant does give up substantial rights by pleading guilty. In this case, the defendant was concerned about the amount of marijuana that would be used at sentencing, the role which he played in the offense, and his eligibility for an acceptance credit. Neither the petitioner nor the United States were certain how those issues would be resolved in subsequent proceedings, so the terms of the plea agreement were structured so that a mutually agreeable compromise was reached on these three factual issues.

The government deprived the petitioner of the benefit of his bargain when the government abandoned its agreed position and actively advocated different results. This advocacy began when the tide of battle began to go in the prosecutor's direction. Thus, when the prosecutor got the better of the evidentiary hearing and when the presentence officer made extremely harsh guideline computations, the prosecutor tried to take advantage of these subsequent events.

However, it was the uncertainty about the outcome of such matters that had generated the plea agreement provisions in the first place.

The rights involved are too basic. The appearance of justice

and the reality of justice should not turn on whether a fundamental issue such as this one is raised before a district judge or not.

The deep split in the Circuits and the unfair results reached by five of those Circuits, justify this Court's attention and a clarification of the rules.

CONCLUSION

WHEREFORE, petitioner respectfully prays that this Court grant certiorari and resolve the conflict between the Circuits as to the meaning of and underlying intent behind the federal statute and United States Sentencing Guideline which apply to marijuana growers. Petitioner also prays that this Court grant certiorari to resolve a conflict among the Circuits as to how prosecutorial breaches of the plea agreement should be analyzed and as to whether such breaches are waived if they are not raised in the district court.

Respectfully submitted,

DAVID A. DODGE
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DAVID A. DODGE, P.C.
Attorneys for Petitioner

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED APRIL 21, 1993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 92-1718

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CRAIG WINES OLIVER,

Defendant-Appellant.

ORDER

BEFORE: NORRIS and SUHRHEINRICH, Circuit Judges; and CONTIE, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further review the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Appendix A

ENTERED BY ORDER OF THE COURT
s/ Leonard Green
Leonard Green, Clerk

APPENDIX B — OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MARCH 10, 1993

NOT RECOMMENDED FOR PUBLICATION

NO. 92-1718

UNITFD STATES COURT OF APPEAL8
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CRAIG WINES OLIVER,

Defendant-Appellant.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

BEFORE: NORRIS and SUHRHEINRICH, Circuit Judges; CONTIE, Senior Circuit Judge.

PER CURIAM. Defendant, Craig Oliver, appeals the district court's order sentencing him to 150 months imprisonment for manufacturing marijuana in violation of 21 U.S.C. § 841. On appeal, he argues that the government breached a plea agreement entered into under Fed. R. Crim. P. 11 and that the district court made various legal and factual errors in the process of computing his sentence under the United States Sentencing Guidelines (the "Guidelines" or "U.S.S.G."). For the following reasons, we AFFIRM.

Appendix B

I.

On September 18, 1990, a Grand Traverse Narcotics Team acquired and executed a search warrant for defendant's garage and discovered 509 bundled plants of marijuana hanging from the rafters. Defendant was later arrested and charged in a two count indictment with manufacturing marijuana from April 1, 1989 through September 18, 1990 and conspiracy to distribute marijuana, in violation of 21 U.S.C. §§ 841 and 846, respectively.

Pursuant to a Fed. R. Crim. P. 11 plea agreement, defendant pled guilty to manufacturing marijuana. In the plea agreement, the government and the defendant entered into three stipulations. First, they agreed that the marijuana manufactured in 1990 did not exceed 509 plants, and that the total amount manufactured over the two year period did not exceed 700 plants. (Plea Agreement, ¶ 3(a)). In addition, qualifying this first stipulation, the defendant reserved the right to introduce evidence that the 1990 quantity was actually less than 509 plants, and that the total number of plants was less than 700; similarly, the government reserved the right to rebut defendant's proofs with argument and evidence. (*Id.*) Second, the parties stipulated that they would recommend a two-level reduction for acceptance of responsibility if the defendant refrained from additional criminal activities and cooperated with the probation department in the preparation of a presentence report. (*Id.* ¶ 3(b)). Third, the parties agreed that under U.S.S.G. § 3B1.1(a) and based on the evidence then known, defendant was not a leader or organizer and his criminal activity was not otherwise extensive. (*Id.* ¶ 3(c)).

The plea agreement also contained two other provisions of significance: (1) defendant acknowledged that the government would fully apprise the district court and probation office of "the

nature, scope, and extent of defendant's conduct in relation to the charges brought against him" (*Id.* ¶ 6); and (2) the parties acknowledged that the plea agreement was not binding on the district court and was only "advisory" in nature. (*Id.* ¶ 7).

After an evidentiary hearing, the district court determined that the total amount of marijuana grown in 1989 and 1990 was between 700 and 1000 plants. Specifically, the court determined that 400 plants were seized by police in 1990 and that at least as many plants were grown by defendant in 1989. Consequently, defendant was sentenced to 150 months imprisonment,[1] to be followed by five years of supervised release. He was also fined $30,000 and $50 mandatory special assessment. This appeal followed.

II.

A.

Defendant argues that by encouraging the district court to find a total number of plants in excess of 700, the government repudiated the stipulation in the plea agreement that the total number of plants involved in the offense charged was no more than 700. He therefore argues that the government breached the plea agreement and that, as a result, his sentence should be vacated and the case remanded for a resentencing before a different judge. *See Santobello v. New York*, 404 U.S. 257, 262-63 (1971).

Initially, we note that defendant failed to raise this issue below and has therefore waived it on appeal. *Baker v. United States*, 781

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1. The Sentencing Guidelines dictate a 121-151 month sentence and offense level 32, criminal history category I.

F.2d 85, 90 (6th Cir.), *cert. denied*, 479 U.S. 1017 (1986). We therefore review for plain error. *United States v. Young*, 470 U.S. 1 (1985).

At the hearing to determine the amount of plants involved, the government presented various witnesses who testified that the total number of plants exceeded 1000. This showing should not have been unexpected: Under the plea agreement, the government had reserved the right to present argument and evidence proving that the total number of plants exceeded 700. (Plea Agreement, ¶ 3(a)). Moreover, not only was the government's showing necessary to meet its burden of establishing by a preponderance of the evidence the amount of drugs involved in the offense, but it was also consistent with paragraph six of the plea agreement, wherein the government pledged to apprise the district court of "the nature, scope and extent of the defendant's conduct regarding the charges against him." (*Id.* ¶ 6). Defendant assented to this provision and cannot now complain that the government's fulfillment of the pledge violated the plea agreement.

B.

Defendant also argues that the district court incorrectly assessed and weighed the evidence regarding the total number of plants involved in the offense. We review the district court's factual findings under a clearly erroneous standard. *United States v. Sivils*, 960 F.2d 587, 596 (6th Cir.), *cert. denied*, 113 S. Ct. 130 (1992). Also, defendant objects on two grounds to the district court's application of U.S.S.G. § 2D1.1. First, he claims that the rule in § 2D1.1 treating each plant as one kilogram does not apply, because the plants in this case were not discovered in an unharvested state. Second, he argues that because the plants involved in this case did not possess rootballs, they could not qualify as plants under § 2D1.1.

Upon review of the record, we cannot say that the court's findings were clearly erroneous. The court heard the testimony of police officers that they counted 509 plants seized in 1990, and which the government corroborated with photographs of the actual plants seized. Further, witnesses testified that many hundreds of plants were grown and harvested in 1989. The district court evaluated the evidence and ruled conservatively in determining that defendant had grown between 700 and 1000 marijuana plants during 1989 and 1990. In light of the district court's careful weighing of the evidence, we hold that on this record there was no error, and do not, at this time, reach the legal issue under § 2D1.1.

C.

Defendant next argues that the district court erred by refusing to grant a two level reduction for acceptance of responsibility. This is a factual issue reviewable under a clearly erroneous standard, *Sivils*, 960 F.2d at 596, and an issue on which defendant bears the burden of proof. *United States v. Perry*, 908 F.2d 56, 58 (6th Cir.), *cert. denied*, 111 S. Ct. 565 (1990).

In refusing to grant the reduction, the district court remarked that "[t]his isn't even a close case . . . [n]o contrition." Elaborating, the court stated that defendant had contempt for the criminal justice system (using profanities, defendant told his probation officer that the federal authorities harass people in order to make drug arrests) and expressed his belief that marijuana should be legalized. The court further noted that the defendant did not fully cooperate with probation in the preparation of the presentence report (defendant withheld financial information and generally frustrated attempts to probe relevant conduct). We agree with the district court's assessment, and find that there was no clear error.

Appendix B

D.

Defendant claims that the district court erred by double counting the same conduct to deny defendant credit for acceptance of responsibility and to sentence at the very top end of the guideline range. We agree with defendant's assertion that a court cannot increase the guideline range by applying the same conduct to multiple guideline provisions. *United States v. Romano*, 970 F.2d 164, 166-67 (6th Cir. 1992); *United States v. Werlinger*, 894 F.2d 1015 (8th Cir. 1990). However, it is clear from the record that the district court did not apply the same conduct to multiple provisions; but merely meted out a sentence within the allowable range. This contention is without merit.

E.

Last, defendant asserts that the imposition of a $30,000 fine is in error because the fine was imposed without appropriate consideration of his ability to pay that fine. The burden of proving inability to pay is on the defendant. *United States v. Hickey*, 917 F.2d 901, 906-07 (6th Cir. 1990); *United States v. Perez*, 871 F.2d 45, 48 (6th Cir.), *cert. denied*, 492 U.S. 910 (1989). Defendant failed to present any evidence to the district court of his impecuniousness. Having failed to meet his burden, this claim too fails.

III.

For all of the reasons stated above, defendant's sentence is AFFIRMED.

CONTIE, Senior Circuit Judge, concurring.

Appendix B

Although I concur in the result reached by my colleagues, I write separately to emphasize how dangerously close the prosecutor came to breaching the plea agreement.

Though the plea agreement provided "that the readily provable relevant conduct of the defendant does not exceed *700* plants for this offense, inclusive of the *509* plants discussed above," Plea Agreement at 2 (emphasis in original), the prosecutor recommended that Oliver be sentenced for manufacturing more than 700 plants:

> [T]he preponderance of the evidence reflects over one thousand plants having been manufactured by the defendant during the course of his relevant conduct. There can be no question that there are at least between seven hundred and one thousand plants which have been manufactured by defendant Oliver during the course of his relevant criminal conduct giving rise to this activity. The government therefore believes that a level 32 offense is justified by a preponderance of the evidence but clearly, if not a level 32 offense, by no means is the criminal activity of the defendant any less than a level 30 offense.

May 29, 1992 Government Memorandum Regarding Sentencing at 5.

Because defendants "give up constitutional rights in reliance on promises made by prosecutors," *United States v. Goldfaden*, 959 F.2d 1324, 1328 (5th Cir. 1992), "[t]he failure of the Government to fulfill its promise affects the fairness, integrity, and

public reputation of judicial proceedings [and] can amount to plain error." *Id. See also Santobello v. New York*, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.").

Nevertheless, because the plea agreement employs the ambiguous phrase "*readily provable* relevant conduct" to limit the number of marijuana plants that Oliver may be held accountable for, I cannot definitively find that the prosecutor breached the plea agreement. Accordingly, I concur in the majority opinion.

ISSUED AS MANDATE: May 28, 1993
COSTS: None
FILING FEE ..... $
PRINTING ..... $
TOTAL ..... $